the first witness, thus striking a well nigh fatal first blow against the defendant. It was not until the seventh day of the trial that the court permitted the defendant to testify that the indictment was the first notice he had of the amount of taxes owed, and that he would have paid such taxes before had the government notified him of the amount. He never was permitted to testify that he wrote and mailed the explanatory letter along with the remittance. When considered by the jury in the light of the defendant's interest in the verdict, his testimony may have been disbelieved, while the jury may have given weight to the statement accompanying the remittance. Considering the letter and the remittance together as parts of one entire transaction the jury may well have rejected any inference of the defendant's bad faith in not having paid the taxes earlier. Failure to reject that inference originally may not have been cured by testimony of the defendant in rebuttal of the inference. It would be just as logical it seems to me to argue that error in admitting an illegal confession was rendered harmless by permitting the defendant to testify in denial of the statements contained in the confession.

Every claim that an error was harmless must be decided according to the circumstances of the particular case, and precedents are rarely if ever controlling. However, the situation considered in *Crawford vs. United States*, 212 U. S. 183, 201, is remarkably similar to this case:

> "* * * The defendant did on the trial testify to the same explanation as contained in the letter of his counsel, i. e., that Aspinwall in

substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it."

In holding an error harmless, the Court should be careful not to substitute its judgment for that of a jury, and thus in effect to deny the defendant's right to trial by jury. I cannot with fair assurance say that if the jury had been allowed to consider the letter it might not have reached a different verdict.[4]

The holding in this case is important also because of its probable effect upon the collection of revenue by the government. Taxpayers may be slow to remit delinquent taxes when the fact of such remittance may be used in evidence against them, while their explanation of the delinquency made at the time of remittance is excluded from evidence.

I think that the case should be reversed and remanded for another trial, and therefore respectfully dissent.

---

[4] Kotteakos vs. United States, 328 U. S. 750, 763; Fiswick vs. United States, 329 U. S. 211, 218; Krulewitch vs. United States, 336 U. S. 440, 444; see Federal Rules of Criminal Procedure, Rule 52(a).

STATUTES INVOLVED

Title 26, Section 51(a), U.S.C., 1946, as amended, 62 Stat. 114, 115:

"Every individual having for the taxable year a gross income of $600 or more shall make a return, which shall contain or be verified by a written declaration that it is made under the penalties of perjury. Such return shall set forth in such cases, and to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the deductions and credits allowed under this chapter and such other information for the purpose of carrying out the provisions of this chapter as may be prescribed by such regulations."

Title 26 Section 54(a), U.S.C., 1946:

"Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe."

Title 26, Section 54(b), U.S.C., 1946:

"Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter."

Title 26, Section 57, U.S.C., 1946:

"As soon as practical after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax."

Title 26, Section 3614(a), U.S.C., 1946:

"The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Title 26, Section 3615(a), U.S.C., 1946:

"It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. The collector may summon any person residing or found within the State or Territory in

which his district lies; and when the person intended to be summoned does not reside and cannot be found within such State or Territory, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned."

Title 26, Section 3615(b)(4). U.S.C., 1946:

"Such summons may be issued—"

"Whenever any person who is required to deliver a monthly or other return of objects subject to tax refuses to allow any regularly authorized Government officer to examine his books."

Title 26, Section 3616(b), U.S.C., 1946:

"Whenever any person—"

"Being duly summoned to appear to testify, or to appear and produce books as required under Section 3615, neglects to appear or to produce said books—he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Title 26, Section 3632, U.S.C., 1946:

(a)(1) "Every collector, deputy collector, internal revenue agent, and internal revenue officer assigned to duty under an internal revenue agent, is authorized to administer oaths and to take evidence touching any part of the administration of the internal

revenue laws with which he is charged, or where such oaths and evidence are authorized by law or regulation authorized by law to be taken."

(2) "Every collector of internal revenue and every superintendent of exports and drawbacks is authorized to administer such oaths and to certify to such papers as may be necessary under any regulation prescribed under the authority of the internal revenue laws."

(b) "Any oath or affirmation required or authorized by any internal revenue law or by any regulations made under authority thereof may be administered by any person authorized to administer oaths for general purposes by the law of the United States, or of any State, Territory, or possession of the United States, or of the District of Columbia, wherein such oath or affirmation is administered, or by any consular officer of the United States. This subsection shall not be construed as an exclusive enumeration of the persons who may administer such oaths or affirmations."

Title 26, Section 3633(a), U.S.C., 1946:

"If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

Title 26, Section 145(a), U.S.C., 1946:

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

Title 26, Section 145(b), U.S.C., 1946:

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 482

JOSEPH JACOB BARSHOP, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The original opinion of the Court of Appeals (R. 1220-1236) is reported in 191 F. 2d 286, and the court's opinion on petitioner's motion for rehearing (R. 1275-1285) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction of petitioner was entered on August 22, 1951. (R. 1237.) A motion for rehearing was denied November 23, 1951. (R. 1286.) The petition for a writ of certiorari was filed on December 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence admitted as part of the Government's case was obtained from the petitioner in violation of the Fourth or Fifth Amendments.

2. Whether the exclusion of the testimony of petitioner's witness Dreeben until after petitioner had testified operated to deprive petitioner of his privilege against self-incrimination.

3. Whether it was error for the trial court to exclude petitioner's self-serving letter sent to the Collector of Internal Revenue after indictment, when the fact of the payment of the alleged tax deficiencies and interest, transmitted with the letter, was admitted.

4. Whether the trial court correctly instructed the jury.

5. Whether the trial court properly admitted rebuttal evidence that the income tax returns of petitioner's brother-in-law did not report as income moneys which he received from the petitioner.

STATUTE INVOLVED

INTERNAL REVENUE CODE:

> SEC. 145 [as amended by Section 5(c), Current Tax Payment Act of 1943, c. 120, 57 Stat. 126]. PENALTIES.
>
> (a) FAILURE TO FILE RETURNS, SUBMIT INFORMATION OR PAY TAX.—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or

declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1946 ed., Sec. 145.)

STATEMENT

Petitioner was indicted on October 4, 1948, on five counts alleging violations of Section 145(b) of

the Internal Revenue Code. (R. 2-6.) Counts 1, 2, and 3 charge that he wilfully attempted to evade and defeat a large part of his income taxes by filing false and fraudulent income tax returns for the years 1942, 1943, and 1944. (R. 3-5.) Counts 4 and 5 charge that he wilfully attempted to evade and defeat the income taxes of his wife by filing and causing to be filed for her false and fraudulent returns for the years 1943 and 1944. (R. 5-6.) After a trial to a jury, petitioner was found guilty on all five counts. (R. 1138.) Motions for judgment of acquittal and in the alternative for a new trial (R. 1138-1162) were overruled. (R. 1167.) Fines of $5,000 were imposed on each of the five counts and a sentence of three years imprisonment was imposed on the first four counts. (R. 1167-1168.) An additional two year sentence was imposed on the fifth count but it was suspended and the petitioner was granted five years probation to begin at the expiration of the three year sentence. (R. 1168.) This judgment was affirmed by the Court of Appeals for the Fifth Circuit (R. 1237), and a motion for a rehearing was denied (R. 1286).

The Government established that petitioner, a wholesale and retail produce dealer, residing in San Antonio, Texas, and his wife, filed separate returns on a community property basis. (R. 31-62.)

Petitioner's reported sources of income were the Banana Distributing Company, Fruit Distributing

Company, and a beer business (which three businesses he owned individually), and a partnership known as the Mexican Banana Company. (Ex. 1, 2, 3, R. 31-55.) In addition, petitioner had an individually owned business of importing pineapples from Mexico. (R. 104.) The pineapple importing business was conducted under a contract which provided that the fruit supplied by the Mexican supplier to petitioner's Banana Distributing Company was to be sold exclusively in the United States. (R. 272-273.) The returns were prepared at the request of the petitioner by H. G. Earnest, accountant and bookkeeper employed by appellant (R. 92) on a part time basis during 1942 and the early part of 1943, and on a full time basis during the latter part of 1943 (R. 86-87). In preparing the returns, Earnest relied upon information furnished by petitioner and the records of the companies in which the petitioner was interested. Earnest was not advised that petitioner had any other income. (R. 87-102.)

After the investigation of his tax returns commenced, petitioner employed a certified public accountant who prepared net worth statements. (R. 139.) These disclosed corrected net income in the amounts recited in the indictment. (R. 144-152.) The unreported income thus reflected was $126,011.90 for 1942, $122,294.65 in 1943, and $113,393.08 in 1944. (R. 150-151.) Based on these figures, taxes would be due and owing by petitioner and his

wife for the indictment years in the exact amounts alleged. (R. 297.) Petitioner's income based on the profit and loss method exceeded that alleged in the indictment. (R. 262, 264 and 266.) Immediately upon the return of the indictment, petitioner made a payment of $260,106.15 to the Collector of Internal Revenue. (R. 63.) On cross-examination of the Government's witness, Deputy Collector Struhall, in charge of the pertinent tax returns, who had testified as to the receipt of this additional amount (R. 19-20), it was brought out that a letter from petitioner had accompanied his check for this payment (R. 71). A photostat of the check for $260,106.15 was introduced by petitioner's counsel, whereupon he offered the petitioner's letter of October 15, 1948 to the Collector of Internal Revenue, Austin, Texas, by which the additional payment after indictment was sent. (R. 71-72.) The letter was excluded on the Government's objection that it was self-serving. (R. 72-73.) In substance, the letter indicated that the enclosed check was to cover the tax deficiencies recited in the indictment after taking credit for the "forgiveness" provisions of the Current Tax Payment Act of 1943 as to 1942 taxes, that certain "commissions" earned in Mexico had been omitted from the pertinent returns for 1942, 1943, and 1944, in the mistaken belief it was not taxable, and that petitioner had no intent to evade payment of income taxes due the United States. (Ex. 2, R. 73-74.)

It was admitted at the trial that petitioner had failed to report or pay tax on substantial income from his pineapple importing business. (R. 804.) This income amounted to over $400,000. (R. 262-266.) Other adjustments made by the Revenue Agent amounted to $192,974.35. (R. 431.) Petitioner entered a $30,000 check, dated April 27, 1943 (Ex. 12, R. 130), on the records of Banana Distributing Company as "J.B. Exchange to buy pines in Mexico" (R. 123-124). This item was in fact a loan (R. 130) and falsely reduced taxable income in that amount (R. 210). A similar entry of a $20,000 check of April 6, 1943 (Ex. 13, R. 110, 130-131), entered as a pineapple purchase on the Banana Distributing Company check stub constituted a transfer of funds between banks and resulted in a false expense deduction. (R. 210, 498-500.) Another $10,000 check, dated November 18, 1943 (Ex. 14, R. 131-132), which was in fact a loan, was entered as a purchase. (R. 208-209, 465.) No checks actually issued in payment of pineapples were in round figures. (R. 198-207, 561-570.) Two checks, one for an investment in onions, in the amount of $9,779.21 (Ex. 20, R. 471), and the other for $685.25 were both entered as purchases from Mexican Banana Company when only the latter was a true entry. (Ex. 21, 472). There was no correcting entry in the Banana Distributing Company books when petitioner received the return of his investment. (Ex. 22, R. 553.) Instead, a deposit was made in petitioner's account at the

Laredo National Bank, at Laredo, Texas. (R. 379.) Petitioner did not record the receipt of profit from the onion investment transaction in his 1944 return. (Ex. 3.)

Payments totalling $94,999.70 were made to petitioner's brother-in-law, Benny Markusfeld. These amounts apparently were treated as payments for services rendered by Markusfeld and were not included by Markusfeld as income (R. 289, 293) but petitioner variously explained that Markusfeld had not imported pineapples; that he drew the money to pay Mr. Isla; that it did not belong to Markusfeld; that it might be money petitioner owed Isla and that it represented Markusfeld's interests in profits from pineapple imports, but, as Markusfeld was sick, petitioner did not want the agents to bother him and that he had therefore stated Markusfeld had no interest in the income and petitioner was willing to add it to his own. Two simultaneous checks included in these payments in 1942, totalling $15,000 were explained by petitioner to the agents as being in odd figures "to make it look good" or "to make it look better". (R. 288-294.) Petitioner acknowledged, on cross-examination, that Markusfeld had not reported these moneys totalling about $95,000 in 1943 and 1944, in his, Markusfeld's, returns for those years. (R. 898-903.)

It was established that petitioner kept no records on his pineapple importing business (R. 266) although petitioner later explained that bank state-

ments and check stubs had been sent to Mexico (R. 267, 935-936). Petitioner did not disclose two bank accounts of his own and one of his wife's when initially questioned by the examining agents. (R. 236-237.) The existence of these accounts was divulged only after petitioner employed a certified public accountant as his representative. (R. 241.) Finally, in each of the returns involved in the indictment, the taxpayer answered "No" to the question "Did you receive during your taxable year any amount claimed to be non-taxable?" (R. 31-62.) His reason for so answering was that this was what he understood to be correct at the time. Later he blamed his bookkeeper. (R. 937-938.)

Petitioner did not contest the existence of unreported income but sought to explain the omission of pineapple income as being the result of the petitioner's understanding from conversations in the latter part of 1942, or early 1943, with a Mr. Barron and others in Mexico, that income earned in Mexico was not subject to taxation. (R. 630-631, 805-806.)

One of the petitioner's witnesses, Dan Dreeben, was asked if he had had a conversation with petitioner sometime in 1942 or 1943, relative to the taxability of income from a pineapple deal petitioner had in Mexico. On objection by the Government, Dreeben was precluded from relating this conversation. (R. 699.) However, following conclusion of petitioner's own testimony, Dreeben was recalled and permitted to testify that petitioner,

some five, six or seven years previous, had discussed this pineapple business and stated "one of the best things about it is that the income is not taxable." (R. 963.)

ARGUMENT

By way of preface it should be noted that petitioner does not contest the sufficiency of the evidence to sustain his conviction. His objections to the holding of the Court of Appeals concern the propriety of the admission and exclusion of evidence by the trial court and the failure of the trial court to give petitioner's requested instructions on the circumstantial evidence.

1. Petitioner's first three specifications of error (Pet. 7-8), which do not appear to have been raised at the trial or in his original procedings in the Court of Appeals, can conveniently be considered as raising one objection. It is contended that the admissions of petitioner to the investigating agents, their testimony as to his failure to disclose certain facts, and evidence of the contents of his records produced for the agents' examination, were involuntarily elicited from petitioner and were inadmissible because the Government agents were empowered by statute so to elicit information to determine the correctness of tax returns. Petitioner contends that if he had declined to furnish the requested information, he would have been subject to prosecution under Section 145(a) of the Internal

Revenue Code, *supra*, pp. 2-3, which makes it a misdemeanor wilfully to fail to supply records or information required to be kept for income tax purposes. It is claimed the use of the damaging admissions and records offends the guarantee of the Fifth Amendment of the Constitution against compulsory self-incrimination, and that records so used must be considered to have been unlawfully seized in violation of the Fourth Amendment.

The answer to this contention is that petitioner does not even claim that he asserted the privilege against self-incrimination in response to the agents' questions or to their demands for his records. This failure to invoke the privilege at the time the information was demanded constituted a waiver. *Rogers* v. *United States*, 340 U.S. 367, 370-371; *United States* v. *Monia*, 317 U.S. 424; *United States* v. *Sullivan*, 274 U.S. 259. And "it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him." *Powers* v. *United States*, 223 U.S. 303, 313. As there was no search or seizure, and as petitioner furnished the information in question without objection, the Fourth Amendment has no application.

2. Petitioner further contends that he was compelled to incriminate himself, in violation of the Fifth Amendment, by the trial court's refusal to permit the witness Dreeben to testify until petitioner had first testified. It is contended that petitioner was thus compelled to take the witness stand

and incriminate himself in order to obtain Dreeben's testimony (Pet. 9).

Dreeben testified as to a conversation which he had with petitioner in 1942 or 1943 in which petitioner was alleged to have discussed his pineapple business and to have indicated that he then considered its profits non-taxable. Dreeben's testimony was first offered and excluded prior to petitioner's taking the stand, and at that time it was probably inadmissible as a self-serving declaration. After petitioner had testified as to that conversation, Dreeben's testimony was received in corroboration. This is entirely in keeping with the rule stated in *Miller* v. *United States*, 120 F. 2d 968 (C.A. 10), and *Haigler* v. *United States*, 172 F. 2d 986 (C.A. 10), on which the petitioner relies so heavily. In any event and more basically, as the Court of Appeals pointed out (R. 1276-1277):

> * * * At the trial no intimation was ever given the court by way of objection or exception that such ruling was in prejudice of defendant's constitutional rights and that it would force him to take the witness stand involuntarily, and we may fairly assume that neither appellant's counsel nor the trial judge understood at the time that it would have such effect. The record further reveals not only that appellant's counsel had already advised the court at the time of such ruling that the defendant would take the witness stand, but also that Dreeben was later permitted to testify as desired. Furthermore, no error in this

regard was even suggested until the taking of this appeal. Under such circumstances, the ruling complained of did not constitute reversible error.

3. No error was involved in the exclusion by the trial court of the letter accompanying petitioner's post-indictment remittance of his alleged tax deficiency. The fact of payment was properly let in as a part of the Government's case as an admission against interest. The payment was evidence only on the issue of the existence of an understatement of taxes. The Government did not seek to introduce the check by which payment was made and petitioner accomplished this during cross-examination of the Government's first witness. Petitioner then offered the letter by which the check had been submitted to the Collector. This letter was properly excluded as it was completely self-serving. It did not explain away the admission as to the existence of the tax deficiency. See VII Wigmore on *Evidence*, Sec. 2113. The letter went to the issue of intent, its substance was stated directly by the petitioner in his testimony and it is significant that no effort was made to put the letter in evidence during the presentation of the taxpayer's defense. It is submitted that no error, much less prejudicial error, arose out of the Court's ruling excluding the taxpayer's letter to the Collector.

4. Petitioner complains of the court's failure to give his requested general instruction on circumstantial evidence. He recognizes, however, (Br.

45) that only the issue of intent rested on circumstantial evidence and it is submitted that the instruction (R. 1066) given by the trial court was fully adequate to inform the jury correctly concerning the standards for testing circumstantial evidence of the petitioner's state of mind. The instruction given is the usual one relating to intent in tax prosecutions. *Paschen* v. *United States,* 70 F. 2d 491 (C.A. 7th).

5. Although petitioner complains that it was improper to elicit from him on cross-examination the fact that his brother-in-law Markusfeld had not reported as income some $95,000 he received from petitioner in 1943 and 1944, this was obviously proper cross-examination. It tended to refute petitioner's contention that the payments were income to Markusfeld (*supra,* p. 8).

CONCLUSION

The decision of the court below is plainly correct and presents no conflict. The petition for writ of certiorari should be denied.

Respectfully submitted,

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JANUARY, 1952.

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